No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly held that the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.*, does not incorporate subsequent developments in the law of foreign-state immunity, including those enacted in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603 *et seq.*

CORPORATE DISCLOSURE STATEMENT

International Finance Corporation was established in 1956 by its founding multilateral treaty, the IFC Articles of Agreement. As a public international organization, IFC is owned by the governments of 184 nations.

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FEDERAL CASES

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Carcieri v. Salazar, 555 U.S. 379 (2009) 49

Carr v. United States, 560 U.S. 438 (2010) 29

City of Newport v. Fact Concerts, Inc.,
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Costello v. INS, 376 U.S. 120 (1964) 29

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DHS v. MacLean, 135 S. Ct. 913 (2015) 35

Dole Food Co. v. Patrickson,
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Epic Sys. Corp. v. Lewis,
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F.D.I.C. v. Meyer, 510 U.S. 471 (1994) 28

FAA v. Cooper, 566 U.S. 284 (2012) 29

FDA v. Brown & Williamson Tobacco Corp.,
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Filarsky v. Delia, 566 U.S. 377 (2012) 27

Filártiga v. Peña-Irala,
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First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172 (2d Cir. 1998) 43

Frend v. United States,
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Gilbert v. United States, 370 U.S. 650 (1962) 26

Guaranty Tr. Co. of New York v. United States, 304 U.S. 126 (1938) 19, 24, 31

Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831) 27

International Refugee Org. v. Republic S.S. Corp., 93 F. Supp. 798 (D. Md. 1950) 33

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) 12, 55, 56

King v. Burwell, 135 S. Ct. 2480 (2015) 16, 31, 34

Kingdom of Roumania v. Guaranty Tr. Co. of New York, 250 F. 341 (2d Cir. 1918) 20

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) 3, 12, 18, 55

McNeill v. United States, 563 U.S. 816 (2011) 29

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 36

Medellin v. Texas, 552 U.S. 491 (2008) 47

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Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 27

Morissette v. United States, 342 U.S. 246 (1952) 15, 26

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Neder v. United States, 527 U.S. 1 (1999) 26

New York State Dept. of Soc. Servs. v. Dublino, 413 U.S. 405 (1973) 34

OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) 59

Permanent Mission of India v. City of New York, 551 U.S. 193 (2007) 24

Pulliam v. Allen, 466 U.S. 522 (1984) 28, 29

Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) 43

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Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 20, 24

Ex parte Republic of Peru, 318 U.S. 578 (1943) 20

Samantar v. Yousuf, 560 U.S. 305 (2010) ..... passim

The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 19

Sekhar v. United States, 570 U.S. 729 (2013) 26

Skilling v. United States, 561 U.S. 358 (2010) 26

Standard Oil Co. of N.J. v. United States,
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Utility Air Regulatory Grp. v. EPA,
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West Virginia Univ. Hosps., Inc. v. Casey,
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Yates v. United States, 135 S. Ct. 1074 (2015) 29

STATE CASES

Curran v. City of New York,
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Alien Tort Statute, 28 U.S.C. § 1350 ..... passim

Civil Rights Act of 1866, 14 Stat. 27 29

42 U.S.C. § 1981 29

42 U.S.C. § 1982 29

42 U.S.C. § 1983 27

Federal Tort Claims Act, 28 U.S.C. §§ 2674, 1346(b) 28

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ..... passim

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International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (22 U.S.C. § 288 *et seq.*) ..... passim

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22 U.S.C. § 288a(b) ..... passim

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28 U.S.C. § 1332 12

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19 C.F.R. § 148.81 39

19 C.F.R. § 148. 87 39

19 C.F.R. § 148.89 39

28 C.F.R. § 5.303 39

Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946) 32, 45, 46

Exec. Order No. 9863, 12 Fed. Reg. 3559 (May 31, 1947) 46

Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956) 9

Exec. Order No. 11,966, 42 Fed. Reg. 4331 (Jan. 24, 1977) 47

LEGISLATIVE MATERIALS

91 Cong. Rec. 12,530 (Dec. 21, 1945) 5

91 Cong. Rec. 12,532 (Dec. 21, 1945) 36

136 Cong. Rec. S7602 (June 7, 1990) 37

H.R. 4489, 79th Cong. § 2(b) (1945) 36

H.R. Rep. No. 79-1203 (1945) 35

H.R. Rep. No. 94-1487 (1976) 42

H.R. Rep. No. 105-802 (1998) 36

International Finance Corporation: Hearings on H.R. 6228 before H. Comm. on Banking and Currency, 84th Cong. 7 (1955) 9

International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. on Banking and Currency, 84th Cong. (1955) 8

S. Rep. No. 79-861 (1945) ..... passim

S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992) 48, 49

TREATIES AND INTERNATIONAL INSTRUMENTS

Articles of Agreement of the International Finance Corporation (1955) 8, 10

Constitution of the Food and Agriculture Organization, art. XVI (Legal Status) (1945) 34, 46

Constitution of the United Nations Educational, Scientific and Cultural Organisation art. XII, Nov. 16, 1945, 4 U.N.T.S. 275 46

Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 20, Oct. 14, 1966, 17 U.S.T. 1270 ..... 46, 47

Headquarters Agreement, League of Nations Journal 1422 (1926) 35, 36

International Labour Organization, Constitution art. 40 (1919) 46

U.N. Charter art. 105 (1945) 34, 44, 45

U.N. Convention on Privileges and Immunities (1946) 35

2 United Nations Relief And Rehabilitation Administration, *A Compilation of the Resolutions on Policy: First and Second Sessions of the UNRRA Council* 51, Resolution No. 32 (1944) 5, 34

TREATISES AND JOURNALS

2 Green Haywood Hackworth, *Digest of International Law* § 173 (1941) 24

Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828 (1947) 37

Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917 (1980) 9

Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (1994) 22

Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* (2018) 22

Restatement (Second) of Foreign Relations § 83 cmt. e 22

Restatement (Third) of Foreign Relations Law, pt. IV, Ch. 6 22

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 7 (2012) 30

Henry G. Schermers & Niels M. Blokker, *International Institutional Law* § 1610 (5th rev. ed. 2011) ..... passim

Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53 (1995) 51

2B Sutherland Statutory Construction (7th ed. West 2012) 30

OTHER AUTHORITIES

British Diplomatic Privileges (Extension) Act, 7 & 8 Geo. 6, C.44; Nov. 17, 1944, Sched. Part. I.1, reprinted in 39 Am. J. Int'l L. Supp. 163 (1945) 35

Closing Address to the Bretton Woods Conference, July 22, 1944 3

Consortium X v. Switzerland, Final appeal judgment, BGE 130 I 312, ILDC 344 (CH 2004), 2nd July 2004, Switzerland 52

Firma Baumeister Ing. Richard L v. O., judgment of 14 December 2004, File No. 100b53/04y (Austrian Supreme Court) 51

1 *Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations*, The Acting Secretary of State to the Attorney General (Washington: Government Printing Office, 1967) 22, 23, 36

1 *Foreign Relations of the United States, 1947, General: The United Nations*, The Secretary of State to the Speaker of the House of Representatives (Washington: Government Printing Office, 1973) 44, 45

33 *Foreign Relations of the United States, 1964-1968, Organization and Management of Foreign Policy*, The Representative to the United Nations to President Johnson (Washington: Government Printing Office, 2004) 45

IFC, *Performance Standards on Environmental and Social Sustainability* 10

IFC Project Information Portal, *IFC Project Mapping*, https://disclosures.ifc.org/#/projectMapping 53

Investment & Finance Company of 11 January 1984 Limited v. UNICEF, No. U 2000 478 Ø, ILDC 64 (DK 1999) 52

Richard Nixon, Message to the Senate Transmitting Convention on the Privileges and Immunities of the United Nations, 1969 Pub. Papers 1037 (1969) 45

Stichting Mothers of Srebrenica v. United Nations, ¶ 4.2, Case No. 10/04437, 13 April 2012, Hoge Raad, ILDC 1760 (NL 2012) 52

U.S. Amicus Br., *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2007) 57

U.S. Amicus Br., *EM Ltd. v. Argentina*, 473 F.3d 463 (2d Cir. Apr. 5, 2006) (No. 06-0403-cv) 42, 49

U.S. Amicus Br., *Thai Lao Lignite (Thailand) Co. v. Lao People's Democratic Republic*, No. 13-495 (2d Cir. May 13, 2013), ECF No. 233 33

U.S. Br., *Guaranty Tr. Co. of New York v. United States*, 304 U.S. 126 (Mar. 26, 1938), 1938 WL 63887 24

U.S. Dep't of State, 9 Foreign Affairs Manual 402.3-7(M) 7

U.S. Dep't of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State* 136, Pub. 2349, Conference Series 71 (June 26, 1945) (San Francisco Conference Report) 4, 5, 21, 34

U.S. Dep't of the Treasury, *Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies* (2017) 53

U.S. Dep't of the Treasury, *Guidance for U.S. Positions on Multilateral Development Banks Engaging on Energy Projects and Policies* 54

U.S. Dep't of the Treasury, *Resource Center, Multilateral Development Banks* 7, 8, 54

World Bank, *Environment Matters at the World Bank: Rio+20* (2012) 10

INTRODUCTION

Preserving the broad immunity from suit that Congress provided in the International Organizations Immunities Act (IOIA) is a matter of vital importance to International Finance Corporation (IFC), its member states, and myriad other international organizations. After World War II, the United States and its allies created the World Bank, the United Nations, and IFC, among others, to advance their collective development and humanitarian interests. In the more than 70 years since, the United States has collaborated with other member states to further these interests throughout the world. These collective interests remain as important today as at any other time, and IFC plays a critical role in advancing them. The economic-development projects financed by IFC advance peace, stability and the national security interests of IFC's member states, including the United States, by alleviating extreme poverty and increasing shared prosperity.

IFC and organizations like it can take collective action because they are able to rely on immunity from suit for their core functions, including, critically, the immunity conferred by the IOIA. When Congress enacted the IOIA in 1945, it afforded international organizations "virtually absolute immunity" from suit in U.S. courts, including suits like petitioners'. Congress did so by adopting the common-law standards then governing the immunity afforded foreign sovereigns in U.S. courts. 22 U.S.C. § 288a(b); *Samantar v. Yousuf*,

560 U.S. 305, 311 (2010) (describing the scope of foreign-state immunity before 1952). But Congress did not adopt those common-law standards because it believed international organizations were equivalent to foreign sovereigns and should therefore receive whatever immunity was afforded foreign sovereigns. Congress adopted those standards for functional reasons: the United States and other member states recognized that international organizations must be able to carry out their missions without any one member state exerting undue influence over the organization through its courts. That protection enables member states with different political and judicial systems to pursue common goals. Without it, local interests or parochial viewpoints could undermine the organizations' multilateral cooperation and governance.

To be sure, in the years since 1945 the United States and other states have concluded that a narrower scope of foreign-sovereign immunity is most consistent with the principles of comity and reciprocity that govern such immunity. But no comparable evolution has occurred regarding immunity for international organizations. And for good reason. Restricting the broad IOIA immunity international organizations have long possessed—and subjecting their collective policy judgments to superintendence by U.S. courts and the looming threat of significant damages—would threaten the core functions of these organizations every bit as much now as it would have in 1945. It would also place enormous pressure on the organizations to avoid the risk of such claims rather than maximize the development impact of their work and pursue the activities their members expect them to take to fulfill their missions.

At the same time, restricting organizational immunity would spur lawsuits by foreign plaintiffs alleging injuries suffered in foreign countries because of actions taken in those countries by foreign entities that happen to be beneficiaries of international-organization loans. In requiring U.S. courts to adjudicate conduct that occurred entirely in another sovereign's territory and that should be adjudicated by that sovereign, these suits will threaten comity in precisely the same way as the Alien Tort Statute (ATS) suits that this Court has consistently rejected. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116-117 (2013).

When considered in light of the IOIA's structure and the purposes for which it was enacted, Section 288a(b) of the IOIA is best read as establishing a fixed rule of virtually absolute immunity for international organizations. This Court should therefore reject petitioners' effort to upend this settled understanding.

STATEMENT

A. The Establishment of Post-World War II International Organizations

As World War II drew to a close, the United States and its allies endeavored to create a post-war order that would foster international cooperation rather than nationalistic strife. International organizations were integral to that effort. As Treasury Secretary Henry Morgenthau explained, "the great lesson taught by the war" was that "the wisest and most effective way to protect our national interests is through international cooperation—that is to say, through united effort for the attainment of common goals." Closing Address to

the Bretton Woods Conference, July 22, 1944, at IV. In keeping with its role as the world's most powerful and vital nation, the United States led the way in establishing these international organizations and defining their missions.

In 1944, the Bretton Woods conference resulted in the creation of the first multilateral development institutions: the International Monetary Fund (IMF) and the World Bank. The IMF was initially charged with establishing an international monetary system, and the World Bank was initially charged with rebuilding war-ravaged Europe. In 1945, the United States hosted the San Francisco Conference, at which the attending nations adopted a charter establishing the United Nations (U.N.). Today, in similar ways, these organizations address current needs; for instance, the World Bank, IFC and others are focused on helping countries like Afghanistan, Iraq, and Somalia to address the aftermath of conflict and crisis.

The United States and other member states understood that international organizations would require immunity from suit to function effectively. The Secretary of State explained that because an international organization would be governed by, and receive contributions from, "all of the member states," the organization should "clearly not [be] subject to the jurisdiction or control of any one of them." U.S. Dep't of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State* 136, Pub. 2349, Conference Series 71

(June 26, 1945) (San Francisco Conference Report).[1] The need for immunity from suit was "particularly important" with respect to the country in which an organization was headquartered. Absent a guarantee of immunity, the host country's courts could exercise considerable control over the organization's functions. The United States thus recognized that it "share[d] the interest of all Members in seeing that no state hampers the work of the [o]rganization[s] through the imposition of unnecessary local burdens" such as litigation in its courts. *Id.*

These organizations' charters (or other governing instruments) accordingly committed member states to guarantee the organizations absolute immunity with respect to fulfillment of their functions. See, e.g., 2 United Nations Relief And Rehabilitation Administration, *A Compilation of the Resolutions on Policy: First and Second Sessions of the UNRRA Council* 51, Resolution No. 32 (1944) (UNRRA Resolution No. 32). Anticipating that the U.N. and other organizations would be headquartered in the United States, the Executive Branch concluded that legislation was needed to ensure that domestic law guaranteed these organizations the immunity that their charters contemplated. See *San Francisco Conference Report* 137; 91 Cong. Rec. 12,530 (Dec. 21, 1945).

B. The International Organizations Immunities Act of 1945

1. To establish a domestic-law rule of immunity for all international organizations, Congress enacted the

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[1] https://babel.hathitrust.org/cgi/pt?id=uiug.30112046487697;view=1up;seq=2.

IOIA. S. Rep. No. 79-861, at 2 (1945) (*Senate Report*). The IOIA confers on international organizations, and their officers and representatives, a wide range of privileges and immunities, including immunity from suit and exemptions from certain duties and taxes. 22 U.S.C. § 288 *et seq.*

The provision at issue in this case, Section 288a(b), provides that "[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time, foreign governments were afforded virtually absolute immunity from suit pursuant to common-law principles espoused by the Executive Branch and adopted by the courts. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Specifically, foreign states were absolutely immune from suit, in the absence of consent, with narrow exceptions involving vessels not in the state's possession and certain property. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-712 (1976) (appending Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., 26 Dept. State Bull. 984 (May 19, 1952) ("Tate Letter")). In 1952, well after the IOIA's enactment, the United States began according foreign states only "restrictive" immunity, under which they were not immune for suits based on their commercial activities. See Part I.A, *infra*.

Section 288 authorizes the President to designate through executive order the international organizations that are entitled to the IOIA's immunities. 22 U.S.C. § 288. Section 288 also authorizes the Presi-

dent to "withhold or withdraw from any [designated international] organization . . . any of the . . . immunities provided for" in the statute "or to condition or limit" the immunity if circumstances warranted. *Ibid.* The President also may revoke an organization's immunity "for any . . . reason." *Ibid.*

2. Since 1945, the President has designated numerous international organizations as entitled to the immunities conferred by the IOIA. U.S. Dep't of State, 9 Foreign Affairs Manual 402.3-7(M). Some organizations, such as the U.N., also possess additional immunities conferred by self-executing treaties. See *Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010). Others have additional immunity conferred by organization-specific statutes incorporating treaty-based immunities into United States law. See, e.g., 22 U.S.C. § 290m-1. Still other organizations do not possess immunity under incorporating statutes or self-executing treaties, and therefore depend entirely on the IOIA. See, e.g., 22 U.S.C. § 288f-3 (International Committee of the Red Cross).

3. The legal provisions described above establish the legal rights of the international organizations to which they apply. The Executive Branch also interacts directly with those organizations in which the United States is a member, participating in governance and ensuring that the organizations further United States interests. The Treasury Department "leads the [United States'] engagement" with multilateral development banks like the World Bank and IFC. U.S. Dep't of the Treasury, *Resource Center: Multilateral Development*

Banks.[2] The United States is a leading contributor to development banks, "ensur[ing] that [it] can help shape the global development agenda." *Ibid.* Treasury representatives serve as Executive Directors on the institutions' governing boards and determine the United States' positions with respect to their projects and policies, after consultation with the State Department and other agencies.

C. International Finance Corporation

1. In 1956, the United States led the effort to establish IFC as an affiliate international organization of the World Bank. Because the World Bank was not designed to promote private-sector investment in developing countries, President Eisenhower explained that IFC would "provide, in association with local and foreign private investors, risk capital for" development projects "when other sources of funds are not available on reasonable terms." *International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. on Banking and Currency*, 84th Cong. 3 (1955) (*Hearings*) (message of the President). IFC thus facilitates development projects that would be impossible without its support, particularly in the world's poorest countries.

2. IFC is governed by its Articles of Agreement (Articles), which were drafted in 1955, against the backdrop of the IOIA, and modeled on the World Bank's 1944 Articles of Agreement. See Articles of Agreement of the International Finance Corporation, *Hearings* 4

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[2] https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx

(Articles).[3] Upon IFC's creation, 30 states signed the Articles and contributed capital. *International Finance Corporation: Hearings on H.R. 6228 before H. Comm. on Banking and Currency*, 84th Cong. 7 (1955) (statement of Treasury Secretary). Today, IFC is owned by 184 member states and funded through their contributions, issuance of bonds, and its own investments. IFC is governed by a Board of Governors and a Board of Directors composed of representatives of the member states. Articles, art. IV.

IFC's Articles provide broad immunities "[t]o enable [IFC] to fulfill the functions with which it is entrusted." Articles, art. VI § 1. The Articles permit IFC to be sued when forgoing immunity furthers its core mission. Specifically, IFC may be sued by purchasers of securities and other direct commercial counterparties. See Articles, art. 6 § 3(vi); Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), *in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980); Pet. App. 9a; *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983).

The Articles' immunity provisions are incorporated into U.S. law. 22 U.S.C. § 282g. Upon IFC's creation, the President designated IFC as an international organization entitled to IOIA immunities. Exec. Order No. 10,680 (Oct. 2, 1956). The Executive Order further provided that the designation "is not intended to

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[3] Current version available at: https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/ifc+governance/articles/about+ifc+-+ifc+articles+of+agreement.

abridge in any respect privileges, exemptions, and immunities which such corporation may have acquired or may acquire by treaty or Congressional action; nor shall such designation be construed to affect in any way the applicability of the provisions of section 3, Article VI, of the Articles of Agreement." *Ibid.*

3. IFC, as a collective institution reflecting the values of its member states, has long been committed to sustainable development. Member states have required IFC not only to avoid projects that may harm the environment, but also to "help[] clients do business in a sustainable way as part of their long term success." World Bank, *Environment Matters at the World Bank: Rio+20*, 49 (2012). IFC has developed market-leading performance standards for managing environmental and social risks, and it generally requires clients to comply with the standards within a reasonable period after IFC's investment. See IFC, *Performance Standards on Environmental and Social Sustainability* 1, ¶ 1; 9, ¶ 12. Typically, these performance standards are far more rigorous than national or local laws require. When a project falls below IFC's standards, IFC engages in a collaborative process to determine how to help its client achieve compliance. *Id.* at 12, ¶ 24. If the client continues to fail to meet IFC's standards, IFC's lending agreements provide various remedial options. C.A.J.A. 254, 269-270, 296, 303.

D. Procedural History

1. In 2008, IFC provided financing to Coastal Gujarat Power Limited (CGPL), an Indian corporation developing a power plant in India. C.A.J.A. 1047. At the time, India faced severe power shortages that threatened its economic progress. C.A.J.A. 1048. Ultimately,

IFC provided a $450 million loan, representing approximately 15% of the project's total debt funding. C.A.J.A. 25. IFC imposed on CGPL environmental standards more rigorous than those required under Indian law. C.A.J.A. 1048. Those standards resulted in "lower emissions of air pollutants" relative to other coal plants. *Ibid.* The project was also designed to emit less greenhouse gas than other coal-based plants. *Ibid.*

2. Petitioners, a group of Indian nationals, filed a complaint with IFC's Compliance Advisor Ombudsman (CAO), alleging that the power plant had caused environmental harms.[4] C.A.J.A. 470. Although the CAO process contemplates both a dispute-resolution and a compliance-audit phase, petitioners refused to engage in dispute resolution, so the CAO proceeded to the compliance-audit phase. The CAO issued findings and suggestions addressing how IFC might better ensure compliance with its self-imposed internal standards.

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[4] In order to provide communities around projects IFC finances with a platform for their voices to be heard, the World Bank Group created the CAO as its independent recourse mechanism. The CAO responds to complaints made by communities about IFC projects and performs three functions: dispute resolution, compliance and advisory. The dispute-resolution function brings the client-borrower and the complainant(s) together in an effort to resolve differences. If the complainant or the client-borrower refuses to participate in dispute resolution, the CAO may proceed to a compliance-audit phase. Under its compliance function, CAO reviews IFC's compliance with its self-imposed internal performance standards, makes recommendations, and monitors responses to those recommendations.

Relying heavily on those findings, petitioners sued IFC in April 2015. Petitioners allege that the plant's construction and operation has damaged the air quality and surrounding marine ecosystem. See, e.g., C.A.J.A. 11-22. It is undisputed that CGPL and its parent company designed, constructed, and operate the project. See, e.g., C.A.J.A. 89-90. Petitioners, however, did not sue CGPL or its parent in U.S. courts, presumably because they could not have done so. See 28 U.S.C. §§ 1331, 1332; cf. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) ("[F]oreign corporations may not be defendants in suits brought under the" ATS.); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-125 (2013). Nor did petitioners sue any of the project's other lenders.

Instead, petitioners sued only IFC, as the sole lender headquartered in the United States. C.A.J.A. 11; 22 U.S.C. § 282f. Despite IFC's lack of management control over CGPL, petitioners allege that IFC tortiously harmed them by failing to ensure that CPGL and its parent complied with the standards set forth in IFC financing agreements (to which petitioners are not parties). C.A.J.A. 36-44.

Petitioners seek significant damages and medical monitoring for a proposed class of Indian nationals. They also seek an injunction "directing the IFC to . . . exercise all . . . leverage practicable" to induce CGPL and its parent to alter the plant design and "ensure" that they, and other companies to which IFC is not

even a lender, conduct their operations in a manner satisfactory to petitioners.[5] C.A.J.A. 42-43, 89-90.

3. IFC moved to dismiss on several grounds, including that IFC was immune under the IOIA. In response, petitioners contended that because the IOIA provides that international organizations "shall enjoy the same immunity from suit" as foreign governments, 22 U.S.C. § 288a(b), international organizations enjoy only the "restrictive" immunity to which foreign states are now entitled under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.* Petitioners contended that their suit fell within the FSIA's exception to foreign-state immunity for certain commercial activities, 28 U.S.C. § 1605(a)(2). The district court dismissed the suit.

4. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court applied its decades-old precedent holding that "foreign organizations receive the immunity that foreign governments enjoyed at the time the IOIA was passed, which was 'virtually absolute immunity.'" *Id.* at 4a-5a (citations omitted). The court observed that "[s]hould appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington," and it "does not seem an exaggeration" that "the floodgates would be open." *Id.* at 11a.

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[5] At CGPL's request, all foreign lenders recently agreed to accept prepayment of CGPL's outstanding indebtedness.

SUMMARY OF ARGUMENT

Congress afforded virtually absolute immunity to international organizations when it enacted Section 288a(b) of the IOIA in 1945. Since that time, international organizations headquartered or operating in the United States have carried out their missions in reliance on the settled understanding—shared by Congress, the Executive Branch, and the courts—that the IOIA confers immunity from suits, like petitioners', that challenge an international organization's exercise of its core functions. Abrogating that understanding now in favor of restrictive immunity would defeat the purpose for which these organizations were granted immunity in the first place and undermine their ability to pursue their important development objectives. It would also open U.S. courts to a potential flood of lawsuits by foreign plaintiffs seeking redress for alleged injuries suffered abroad at the hands of foreign funding recipients, where the only connection to the United States is that defendant international organization happens to be headquartered here. The best reading of the statutory text, considered in light of the IOIA's structure and the purposes for which it was enacted, forecloses the harmful, counterproductive result that petitioners seek.

I. The IOIA provides that "international organizations . . . shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). When the IOIA was enacted, foreign states enjoyed "virtually absolute immunity" pursuant to well-established common-law principles recognized in the first instance by the Executive Branch and adopted

by the courts. See *Samantar v. Yousuf*, 560 U.S. 305, 311-312 (2010).

Section 288a(b) incorporates that common-law standard to define international organizational immunity. Because Section 288a(b) adopts the common law, the meaning of its reference to "the same immunity . . . as is enjoyed by foreign governments" must be determined as of the time of enactment. See, e.g., *Morissette v. United States*, 342 U.S. 246, 263 (1952). Petitioners' contrary argument relies heavily on the reference canon, but that canon is entirely inapposite, as it applies only to provisions that incorporate another *statute* by reference. Section 288a(b) therefore establishes for international organizations an unchanging rule of virtually absolute immunity that does not fluctuate with subsequent changes in foreign-state immunity.

That construction is necessary to give effect to Congress's understanding of the purposes of international organizational immunity—purposes that are completely different from those animating foreign-state immunity. *Senate Report* 3. Foreign-state immunity is accorded by one coequal sovereign to another as a matter of comity and reciprocity. International organizations needed a separate grant of immunity precisely because they are *not* sovereigns, and possess neither territory nor governmental authority. As non-sovereign collective bodies, organizations need immunity to safeguard their pursuit of their member states' collective objectives, free of undue interference by the courts of any one state. In the IOIA, then, Congress adopted the common-law rule then applicable to foreign states not because it believed that organizational immunity should be inextricably linked to that of foreign states,

but because adopting the then-prevailing substantive rule furthered the distinct purposes of international organizational immunity.

The statutory structure and purpose confirm that Section 288a(b) establishes a fixed substantive rule. See *King v. Burwell*, 135 S. Ct. 2480, 2490-2491 (2015). Several provisions of the IOIA—Section 288a(b)'s express statement that organizations may waive their immunity, Section 288's authorization of the President to "limit" but not expand the baseline immunity established in Section 288a(b), and Section 288b's provision of immunity from discovery—are fundamentally inconsistent with a fluctuating rule of immunity. So too is Congress's expressed intent that the IOIA would ensure compliance with existing—and unchanging—international obligations to accord nearly absolute immunity to certain international organizations.

The FSIA did not change the IOIA's substantive rule of virtually absolute immunity. By its terms, the FSIA does not apply to international organizations. *Samantar*, 560 U.S. at 320-325. And the immunity rules that it establishes cannot sensibly be applied to international organizations, creating significant uncertainties that Congress surely would have resolved had it enacted the FSIA with organizations in mind.

II. The Executive Branch's historical practice cannot be reconciled with the interpretation of Section 288a(b) that petitioners and the government now advance. Had international organizational immunity drastically constricted in 1952 with the adoption of restrictive immunity for foreign states in the Tate Letter, the U.N. and other organizations would have suddenly lost the absolute immunity that the United States and

other member states had collectively agreed to accord them. Yet the Executive Branch gave no hint that such a radical shift had occurred. That long course of conduct is far more telling than the government's assertion of the opposite view before this Court. That position is simply the latest iteration of a shifting litigation posture and deserves no deference.

III. Subjecting international organizations to restrictive immunity would defeat the very purpose of granting them immunity in the first place. IFC and other multilateral development banks routinely use the tools of commerce to advance their decidedly noncommercial collective missions of promoting economic development and international stability. Should petitioners prevail, they and future plaintiffs will argue that IFC's use of the tools of commerce subjects its core development activities to suit under the FSIA's commercial activities exception. Such suits would be irreconcilable with the purposes of organizational immunity, as they will invite national courts to second-guess the organization's policy judgments—which reflect the considered collective judgment of the member states—and burden its collectively contributed finances.

Permitting such suits would have dramatic implications for IFC and other development institutions. IFC is currently involved in hundreds of development projects, including in the most challenging locations in the world. International organizations like IFC offer prospective plaintiffs a particularly attractive slate of characteristics: self-imposed, rigorous internal standards, deep pockets, and a jurisdictional hook to get their claims before a U.S. court. Restricting IFC's immunity would invite myriad lawsuits seeking to hold it liable for everything from allegedly adverse project

outcomes to a host government's illegal conduct. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). The prospect of becoming enmeshed in contentious litigation threatening billions in damages would force IFC to reevaluate its operations and policies to minimize litigation risk—a perspective that would be inimical to its development mission. More broadly, permitting such suits would open U.S. courts to foreign-focused challenges with only the most tenuous connection to the United States. Those suits will raise the same policy and comity concerns as the similar ATS lawsuits against U.S. corporations that proliferated until this Court limited them.

ARGUMENT

I. SECTION 288a OF THE IOIA ESTABLISHES A SUBSTANTIVE RULE OF VIRTUALLY ABSOLUTE IMMUNITY.

A. When The IOIA Was Enacted, Federal Common Law Accorded Foreign States Virtually Absolute Immunity.

The IOIA provides that "[i]nternational organizations, their property and their assets . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time of the IOIA's enactment, the phrase "the same immunity . . . as is enjoyed by foreign governments" had a definite, well-established meaning under the common law: it conferred what this Court has characterized as "virtually absolute immunity," i.e., immunity from all suits, with narrow excep-

tions (described below). See *Samantar*, 560 U.S. at 311.

1. In 1945, foreign-state immunity was governed by common-law principles that were suggested in the first instance by the Executive Branch and then adopted by courts. *See Samantar*, 560 U.S. at 311-312 (citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)). The rules of foreign-state immunity were "a matter of grace and comity" among coequal sovereigns, informed by considerations of foreign relations and reciprocity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). At the time, the common-law rule was clear: the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Ibid.*; *Samantar*, 560 U.S at 312.

In 1952, the State Department described the applicable principle of immunity as "virtually absolute":

> According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. . . . The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-712 (1976) (quoting Tate Letter). Accordingly, in the years preceding the IOIA's enactment, this Court uniformly declared that "upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent." *E.g., Guaranty Tr. Co. of New York v. United States*, 304 U.S. 126, 134 (1938).

Immunity extended to foreign states' commercial activities. This Court explained in cases involving state-owned vessels engaged in commercial activities that "a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States." *The Navemar*, 303 U.S. 68, 74 (1938); accord *Ex parte Republic of Peru*, 318 U.S. 578, 580 (1943); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 570 (1926). The same was true in non-admiralty suits involving commercial contracts. See *Kingdom of Roumania v. Guaranty Tr. Co. of New York*, 250 F. 341, 343 (2d Cir. 1918).

Foreign-state immunity was characterized as "virtually" absolute because narrow exceptions existed for suits concerning real property that was not diplomatic or consular property, and for suits concerning vessels owned but not possessed by foreign states. *Alfred Dunhill*, 425 U.S. at 712; *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36-37 (1945).[6] Apart from these narrow exceptions, foreign states possessed complete immunity.

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[6] *Hoffman* explained that when a vessel was owned but not possessed by a foreign state, the Executive and the courts have historically not recognized immunity. 324 U.S. at 36-37. That rule had origins in nineteenth-century admiralty law, *The Davis*, 77 U.S. (10 Wall.) 15 (1869), and reflected concern that immunity would leave no party responsible for the vessel. *The Attualita*, 238 F. 909, 911 (4th Cir. 1916). Moreover, such suits did not involve the "indignity" of "oust[ing] the possession of a foreign state." *Hoffman*, 324 U.S. at 38.

2. a. When Congress adopted the common-law standard of virtually absolute foreign-state immunity in the IOIA, it did so to provide international organizations with the protection they would need to function effectively. As the Executive Branch explained in 1945, in connection with the U.N.'s establishment, broad immunity would be necessary "to insure the smooth functioning of the [o]rganization free from interference by any state." *San Francisco Conference Report* 159. Moreover:

> The United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them .... The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat. ... The United States shares the interest of all Members in seeing that no state hampers the work of the Organization through the imposition of unnecessary local burdens.

Ibid.

Contrary to petitioners' assertion (Br. 32), Congress did not believe that international organizations were equivalent to foreign sovereigns and should therefore receive whatever immunity foreign sovereigns received. International organizations are not sovereigns. They do not possess their own territory and jurisdiction. And they are not granted immunity for the reasons foreign states are granted immunity—i.e., to further principles of comity and reciprocity. See *Verlinden*, 461 U.S. at 486. Rather, international organizations are granted immunity to ensure that these organizations, as entities with their own international and

legal personalities and composed of numerous member states, will be able to carry out their missions without interference from any one state.

As one scholar has explained: "[T]o assimilate [international organizations] to states . . . is not correct. Their basis of immunity is different. The relevant test under general international law is whether an immunity from jurisdiction . . . is necessary for the fulfilment of the organization's purposes," not whether it was acting "in sovereign authority." Rosalyn Higgins, *Problems and Process – International Law and How We Use It* 93 (1994); see *Restatement (Second) of Foreign Relations* § 83 cmt. e ("The immunity of an international organization is not determined by the rules . . . as to the immunity of a foreign state. States do not recognize in international organizations the sovereignty which is generally deemed the basis of those rules. Likewise, considerations of reciprocity, which afford a practical basis for the immunity of a foreign state, are inapplicable in the case of an international organization."); see also *Restatement (Third) of Foreign Relations Law*, Part IV, Ch. 6 Introductory Note (1987); Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* 352 (2018); Henry G. Schermers & Niels M. Blokker, *International Institutional Law* § 1610, at 1033 (5th rev. ed. 2011).

b. When it enacted the IOIA, Congress was well aware of the distinct reasons for granting immunity to international organizations. *Senate Report* 4. Indeed, the State Department urged the IOIA's enactment specifically to ensure that international organizations had the immunity necessary to function effectively. 1 *Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations*, The Acting Secre-

tary of State to the Attorney General 1559 (Washington: Government Printing Office, 1967) (*1945 Foreign Relations*). Congress explained that it enacted the IOIA "to facilitate fully the functioning of international organizations in this country." *Senate Report* 4. And the IOIA's text confirms Congress's understanding that international organizational immunity rested on different principles than foreign-state immunity. Section 288f provides that international organizations "shall" enjoy immunity "notwithstanding" reciprocity rules governing foreign-state immunity—even though reciprocity was at the time a primary consideration in deciding whether a foreign state should be given immunity. 22 U.S.C. § 288f (immunities shall be provided "notwithstanding" that "immunities granted to a foreign government . . . may be conditioned upon the existence of reciprocity by that foreign government"); *Senate Report* 5-6.

3. In 1952, after the IOIA's enactment, the State Department announced "a shift in policy" in the Tate Letter: the Executive would thereafter apply the "restrictive" theory in considering foreign-government requests for recognition of immunity. *Alfred Dunhill*, 425 U.S. at 714 (appending Tate Letter); *id.* at 712. By 1952, foreign sovereigns had increasingly distinguished between a state's "sovereign" and "private" acts, concluding that when a foreign state acted in the same manner as a private party in the market, those acts lacked a sovereign character. *Id.* at 711. Given this change in international practice, the United States concluded that principles of comity and reciprocity no longer justified absolute immunity. *Ibid.* Foreign states would therefore no longer receive immunity for

suits arising from their "private acts," including commercial activities. *Id.* at 713.

The Tate Letter says nothing about international organizations, and its discussion of the reasons for narrowing foreign-state immunity is founded only on comity and reciprocity—considerations that are irrelevant to international organizational immunity. Petitioners and the government identify no evidence that the Executive Branch believed it was narrowing the scope of international organization immunity when it issued the Tate Letter.[7]

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[7] The Tate Letter announced a sharp break with prior policy. The government nonetheless suggests (Br. 17-18) that *Hoffman* had already moved toward restrictive sovereign immunity. That is incorrect. *Hoffman* rested on two grounds, neither of which concerned commercial activities: (1) courts had uniformly rejected immunity for state-owned vessels not in the state's possession, see note 6, *supra*, and (2) the Executive did not suggest immunity. 324 U.S. at 35-36, 38. The government observes (Br. 17) that the State Department had previously urged denying immunity to state-owned vessels used for commercial purposes. But this Court rejected that position. *Berizzi Bros.*, *supra*. So did the Justice Department: it declined to advance State's position in this Court. 2 Green Haywood Hackworth, *Digest of International Law* § 173, at 430 (1941).

Petitioners go even further (Br. 37-40), contending that no substantive rule of immunity existed in 1945. This Court's decisions and the Executive's statements refute that assertion. See, e.g., *Alfred Dunhill*, 425 U.S. at 714 (appending Tate Letter); *Samantar*, 560 U.S. at 311; *Permanent Mission of India v. City of New York*, 551 U.S. 193, 199 (2007); U.S. Br., *Guaranty Tr. Co. of New York v. United States*, 304 U.S. 126 (Mar. 26, 1938), 1938 WL 63887, at *8.

B. The IOIA Adopts For International Organizations The Common-Law Rule Of Virtually Absolute Immunity That Applied To Foreign States In 1945.

Section 288a(b) provides that international organizations and their property "shall enjoy the same immunity from suit" as "is enjoyed" by foreign governments. Because the common law provided foreign states with virtually absolute immunity in 1945, Section 288a(b) unquestionably conferred on international organizations the same virtually absolute immunity possessed by foreign states when it was enacted.

The question before this Court is whether Section 288a(b) sets forth a fixed substantive rule of virtual absolute immunity for international organizations as the D.C. Circuit has held for decades, or whether it instead incorporates by reference all post-1945 fluctuations in foreign-state immunity. Two aspects of Section 288a(b) demonstrate that the provision establishes a fixed rule. First, statutes that, like Section 288a(b), adopt common-law rules are construed to adopt the common law as it existed at the time of enactment absent clear evidence to the contrary. Second, the statutory context, structure and purpose confirm that Section 288a(b) established a fixed rule.

1. Section 288a(b) codifies the federal common-law rule of virtually absolute immunity.

a. Petitioners and the government overlook the significance of a critical feature of Section 288a(b): the *source* of the rule that it adopts. In defining an international organization's immunity from suit, Section 288a(b) codifies a specific common-law standard—not a

standard set forth in another federal statute. *Samantar*, 560 U.S. at 311. Under the common law of foreign-state immunity in 1945, the "same immunity from suit . . . as is enjoyed by foreign governments" meant virtually absolute immunity. See pp. 18-24, *supra*. By using that formulation, Congress was able to codify for international organizations the substantive standards applicable to foreign states, without spelling out every nuance of the common law.[8]

When Congress enacts a statute that adopts a common-law concept, courts must presume that Congress "adopt[ed] the cluster of ideas that *were attached* to each borrowed word in the body of learning from which it was taken" at the time of enactment, absent clear evidence of contrary intent. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added); see, e.g., *Neder v. United States*, 527 U.S. 1, 21 (1999); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 494-495 (1940). This Court has therefore consistently construed statutes adopting common-law concepts by looking to the common law at the time of the statute's enactment. See *Skilling v. United States*, 561 U.S. 358, 407 (2010); *Sekhar v. United States*, 570 U.S. 729, 733 (2013); *Gilbert v. United States*, 370 U.S. 650, 655

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[8] Petitioners contend (Br. 24) that Congress could have expressly provided "the specific level of immunity it thought existed at the time." But that is what Congress did. While foreign states generally had absolute immunity, the common law also included more nuanced rules for vessels and certain foreign-state property. See pp. 19-20, *supra*; *Alfred Dunhill*, 425 U.S. at 713. Adopting the common-law standards enabled Congress to capture these nuances. Indeed, Congress often chooses to adopt a common-law rule rather than fully articulating the rule.

(1962) (examining "the common-law meaning of forgery at the time the 1823 statute was enacted"); cf. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (explaining general principle that congressional intent is measured by reference to law at time of enactment).

The Court also looks to the common law at the time of enactment when a statute incorporates broader common-law doctrines, including immunity doctrines. For example, the Court has held that 42 U.S.C. § 1983 incorporates immunities under "the common law as it existed when Congress passed § 1983 in 1871." *Filarsky v. Delia*, 566 U.S. 377, 384 (2012). In determining whether an official sued today under Section 1983 should have immunity, therefore, the Court undertakes "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Tower v. Glover*, 467 U.S. 914, 920 (1984). The Court then decides whether Congress intended that common-law rule to apply, rather than canvassing subsequent evolution in the common law. *Filarsky*, 566 U.S. at 389. Similarly, in construing the scope of "appropriate equitable relief" under ERISA, a statute enacted against the backdrop of the law of trusts, the Court examines what relief would have been "typically available in equity" at the time of the divided bench—not the relief that would be considered "equitable" and available today.[9] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

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[9] Petitioners' examples (Br. 20) are inapposite because they do not codify a principle with a specific common-law meaning. The Rules of Decision Act, 28 U.S.C. § 1652, is "no more than a declaration of what the law would have been without it," *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831), i.e., a state-

This Court's cases have thus proceeded on the "important assumption" that the Congress that enacted a particular statute "w[as] familiar with common-law principles" at the time, and "that [it] likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); accord *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). Because Section 288a(b) adopts the common-law rule governing foreign-state immunity, the scope of the "same immunity from suit . . . as is enjoyed by foreign states" should be determined by reference to the common law at the time of the IOIA's enactment.

b. Nothing in Section 288a(b)'s text suggests otherwise—much less provides clear evidence of a contrary legislative purpose. Petitioners rest their argument for a fluctuating standard of incorporation on Section 288a(b)'s use of the word "same," and its use of the present tense formulation "as is enjoyed." But those words will not bear that weight. The word "same" simply means "identical"; it does not indicate whether the quality of "sameness" should be measured at the time the statute is applied or at the time the statute was enacted.[10] And the present-tense phase "is en-

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ment that federal courts should apply state law when state law applies. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 162, (1987) (Scalia, J., concurring in the judgment). The Federal Tort Claims Act, 28 U.S.C. §§ 2674, 1346(b), simply waives the United States' immunity in certain cases, leaving the United States subject to the same state-law liability rules that apply to private parties. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994).

[10] Petitioners' reliance on the Civil Rights Act of 1866, which directs that African Americans receive "same" rights as "white

joyed" could refer either to the time of enactment or the time of application. Precisely because the present tense is susceptible to more than one interpretation, this Court has repeatedly held that the statutory context may demonstrate that the present tense refers to a time prior to the time in which the statute is applied.[11] See *McNeill v. United States*, 563 U.S. 816, 821 (2011) (construing present-tense language to refer to law at the time of a previous conviction, not the time of application); *Costello v. INS*, 376 U.S. 120, 125 (1964) ("the

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citizens," ignores the statute's different purpose and context. See Civil Rights Act of 1866, 14 Stat. 27; 42 U.S.C. §§ 1981, 1982. The whole point of the Civil Rights Act was to establish a rule of equal treatment based on the principle that persons of different races are equal before the law. That purpose could be vindicated only if African Americans enjoyed the same evolving rights as white citizens. See *Pullium*, 466 U.S. at 529. The IOIA is entirely different. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("identical language may convey varying content when used in different statutes"); *FAA v. Cooper*, 566 U.S. 284, 292 (2012). It affords international organizations immunity to further the entirely distinct purpose of that immunity. See pp. 20-21, *supra*. That purpose is effectuated by reading the IOIA's reference to "the same" immunity to adopt the substantive common-law standard.

[11] The cases on which the government relies (Br. 14) are not to the contrary. Two concern statutes that use the *past* tense. *United States v. Wilson*, 503 U.S. 329, 333 (1992); *Barrett v. United States*, 423 U.S. 212, 216 (1976). *Carr v. United States*, 560 U.S. 438, 448 (2010), involved the very different question whether a criminal statute applied to conduct committed before the statute was enacted. In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003), the Court construed the FSIA's use of present tense in light of the principle that sovereign status is determined on the *facts* existing at the time of suit.

tense of the verb 'be' is not, considered alone, dispositive").

Because neither Section 288a(b)'s use of the present tense nor its use of the word "same" requires that the statute be read in the manner petitioners propose, petitioners invoke the "reference canon." That canon, they assert, holds that whether a statute refers to a statutory rule as it existed at the time of enactment or the time of application depends not on the statute's tense, but on the generality or specificity of the referred-to statutory rule. Petitioners' reliance on the reference canon is misplaced. It applies when statutes "refer to another *act* and incorporate part or all of it by reference." 2B Sutherland Statutory Construction § 51:7 (7th ed. West 2012) (emphasis added) (*Sutherland*). Indeed, the treatise section on which petitioners rely (Br. 17) is entitled "*statutes* adopted by reference." *Id.* (emphasis added); accord Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 90 (2012). The reference canon has no application to statutes like Section 288a(b) that adopt common-law principles.

Indeed, far from supporting petitioners, *Sutherland* confirms that Section 288a(b) should be construed to adopt the virtually absolute immunity that foreign states had in 1945. *Sutherland* states that statutes that incorporate common-law principles adopt those principles as they existed at the time of enactment, and that subsequent changes in the common-law principles do not alter the "meaning and effect" of the legislation. *Sutherland* § 50.1; see *id.* § 50.2.

2. The statutory structure and purpose confirm that Section 288a(b) establishes a fixed rule of virtually absolute immunity.

a. Three aspects of the IOIA's structure confirm that in invoking the common law of virtually absolute foreign-state immunity, Congress intended to adopt an unchanging substantive rule. See *King v. Burwell*, 135 S. Ct. 2480, 2490-2491 (2015) ("the way different provisions in the statute interact" and the "statutory context" may remove any ambiguity otherwise inhering within the provision); see also *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'") (citation omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

First, the interaction of Section 288a(b)'s two clauses demonstrates that the first clause establishes a substantive rule of immunity. While the first clause confers "the same immunity . . . as is enjoyed by foreign governments," the second clause provides that international organizations "may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b). If, as petitioners argue, the first clause merely incorporated by reference the *body* of foreign-state immunity law, it would have been superfluous to specify that international organizations could waive their immunity. That power was already a well-established part of the body of foreign-state immunity law. See, e.g., *Guaranty Trust*, 304 U.S. at 134.

Second, Section 288 demonstrates that Section 288a establishes a fixed substantive rule of immunity. Section 288 provides that the "President shall be authorized, in the light of the functions performed by any such international organization . . . to withhold or withdraw" immunity from such an organization, or to "condition or limit" or "at any time to revoke" the immunity conferred in Section 288a. 22 U.S.C. § 288. That authority to make case-specific judgments is inconsistent with a baseline rule that can be automatically altered wholesale by changes in the independent body of law governing foreign-state immunity. For one thing, Section 288 demonstrates that Congress contemplated that the scope of an organization's immunity might require adjustment, in light of both changing circumstances over time and the range of functions that various organizations fulfill. *Senate Report* 3-4. Congress chose to delegate authority to effect such changes to the Executive Branch, in the exercise of its foreign-relations expertise. The efficacy of that mechanism for organization-specific, circumstance-specific adjustments would be undermined by a baseline rule that would automatically change for all organizations any time foreign-state immunity changed.[12]

Even more to the point, authorizing the President to "limit," but not expand, an international organization's

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[12] Petitioners argue (Br. 29-30) that Section 288 does not permit the President to adjust organizational immunity across the board. But the text does not foreclose it. And the President often establishes immunity for multiple organizations in a single executive order. See, e.g., Exec. Order 9698 (Feb. 19, 1946). The President could also implement across-the-board changes through organization-specific orders.

immunity, 22 U.S.C. § 288, makes sense only if Section 288a(b) establishes a fixed rule of virtually absolute immunity. If Section 288a's scope could automatically be limited by a subsequent limitation of foreign-state immunity, the Executive would have no ability to broaden an organization's immunity beyond that newly narrowed baseline—even if doing so would be warranted by that organization's circumstances.[13]

Third, Section 288a(c) provides that "[t]he archives of international organizations shall be inviolable." 22 U.S.C. § 288a(c). That provision prohibits all compelled discovery. *Taiwan v. United States District Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997); U.S. Amicus Br. 20-21, *Thai Lao Lignite (Thailand) Co. v. Lao People's Democratic Republic*, No. 13-495 (2d Cir. May 13, 2013), ECF No. 233. Had Congress thought that international organizations might eventually be subject to a wide range of suits in which they had not voluntarily waived their immunity, it would not have simultaneously granted them immunity from all compelled discovery.

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[13] By expressly establishing the procedures governing organizational immunity, these provisions demonstrate that Congress did not intend to incorporate pre-existing Executive Branch procedures used in cases involving foreign states. But cf. U.S. Br. 29-30. Executive practice does not suggest otherwise. While the Executive suggested immunity in a 1947 case, it does not appear to have done so thereafter, and any such practice had ended by 1960. Compare *Curran v. City of New York*, 77 N.Y.S.2d 206 (Sup. Ct. 1947), with *International Refugee Org. v. Republic S.S. Corp.*, 93 F. Supp. 798, 805 (D. Md. 1950) (finding immunity without an Executive suggestion); C.A.J.A. 1054-1055.

b. Section 288a(b)'s statutory purpose further confirms that the provision establishes a substantive rule of virtually absolute immunity. See *New York State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes."); *King*, 135 S. Ct. at 2493 (same).

Congress enacted the IOIA to "enabl[e] this country to fulfill its commitments in connection with its membership in international organizations." *Senate Report* 3; see also *San Francisco Conference Report* 158-160. By 1945, the United States had entered into international agreements "in connection with the creation of [the United Nations Relief and Rehabilitation Agency (UNRRA)], the International Monetary Fund and International Bank, the Food and Agriculture Organization of the United Nations, and others." *Senate Report* 3. These treaties included "[p]rovisions . . . with respect to the problem of privileges and immunities." *Ibid.*

Many of those "provisions" committed the United States to guaranteeing virtually absolute immunity. For instance, the 1944 resolutions governing UNRRA stated, in language very similar to that used in Section 288a, that "the member governments [shall] accord to the Administration the facilities, privileges, immunities, and exemptions *which they accord to each other, including (a) Immunity from suit and legal process except with the consent* of" the organization. UNRRA Resolution No. 32 (emphasis added). Similarly, the United States agreed in 1945 to provide absolute immunity to the Food and Agriculture Organization (FAO). Constitution of the FAO, art. XVI (1945); see also U.N. Charter art. 105, ¶ 1 (committing to accord

"such privileges and immunities as are necessary for the fulfillment of its purposes") (1945); U.N. Convention on Privileges and Immunities art. II, § 2; *id.* art. IV, §§ 11-16 (1946) (providing U.N. with absolute immunity from suit).

Congress's purpose of enabling the United States to secure the necessary immunity for these organizations could be effectuated only with a substantive rule of virtually absolute immunity. Under petitioners' construction, however, the immunity from suit accorded by the IOIA could suddenly contract based on changes in foreign-state immunity—placing the United States in violation of its international commitments without advance warning, much less consideration by Congress. That would defeat the very purpose for which Congress enacted the statute. See *DHS v. MacLean*, 135 S. Ct. 913, 920 (2015) (rejecting "[a] broad interpretation of the word 'law' [that] could defeat the purpose of the whistleblower statute").

c. Finally, Congress understood the IOIA's protections to be "standard in light of" two "important precedents," both of which conferred absolute immunity from suit. *Senate Report* 3. The House and Senate Reports explained that the IOIA was consistent with both the 1926 League of Nations headquarters agreement, and the 1944 British Diplomatic Privileges (Extension) Act. *Ibid.*; H.R. Rep. No. 79-1203, 2-3 (1945) (*House Report*). The former provided that the League of Nations "cannot, in principle, according to the rules of international law, be sued before the Swiss Courts without its express consent." Headquarters Agreement, League of Nations Official Journal 1422, art. I (1926). And the British legislation likewise provides international organizations with "[i]mmunity from suit

and legal process." 7 & 8 Geo. 6, C.44; Nov. 17, 1944, Sched. Part. I.1, *reprinted in* 39 Am. J. Int'l L. Supp. 163, 167 (1945). As Congress explained, "[b]oth of these constitute important precedents for the legislation now before us and the British legislation is substantially similar in conception and content to the legislation under consideration." *House Report* 3; *Senate Report* 3.[14]

d. Ignoring the overwhelming weight of the historical evidence, petitioners point to a single snippet of legislative history: an earlier version of the IOIA that would have provided "immunity from suit and every form of judicial process." Br. 36-37 (quoting H.R. 4489, 79th Cong. § 2(b) (1945)). But that unenacted version does not suggest that Congress rejected a rule of absolute immunity. The bill's House sponsor did not include the amendment adopting the ultimately enacted language as one of the "substantive" amendments meriting discussion on the House floor. 91 Cong. Rec. 12,532 (Dec. 21, 1945). Congress evidently did not view the earlier conferral of absolute "immunity from suit" as materially different from the enacted language. And in any event, "mute intermediate legislative maneuvers are not reliable indicators of congressional intent."[15] *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (internal quotation marks omitted).

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[14] The State Department observed that the IOIA granted "less extensive privileges" than the British legislation. That legislation, unlike the IOIA, conferred diplomatic immunity on organizational officials. *1945 Foreign Relations* 1559-1560.

[15] Petitioners contend that Congress has subsequently "noted its understanding that the IOIA tracked" changes in foreign state immunity law. Pet. Br. 35 n.6 (citing H.R. Rep. No. 105-

3. Petitioners' remaining textual arguments lack merit.

Petitioners make two additional textual arguments, neither of which has merit.

a. Petitioners first (Br. 27) contrast Section 288a(b) to other IOIA provisions that expressly set forth substantive rules of immunity. Petitioners infer from the language of these provisions that Congress did not intend to adopt a fixed substantive rule in Section 288a(b). But that inference is unwarranted. Congress set forth specific substantive immunities when it intended to confer on organizations fewer than all of the diplomatic privileges and immunities foreign governments enjoyed under the common law. In these situations, Congress could not simply adopt the common-law standards applicable to foreign states, as it did in Section 288a(b).

For example, Section 288a(c) provides that international organization property is "immune from search," and that their "archives shall be inviolable." 22 U.S.C. § 288a(c). These are among the privileges traditionally afforded the diplomatic missions of foreign states, but they represent less than the full slate of such privileges. See, e.g., *Frend v. United States*, 100 F.2d 691, 693 (D.C. Cir. 1938); Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828, 838 (1947). Similarly, Section 288b's exemption of organizational officials from customs and importation

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802, at 13 (1998)). But other congressional statements point in the opposite direction. See 136 Cong. Rec. S7602 (June 7, 1990) (opining that "international organizations retain absolute immunity" under the IOIA).

taxes is narrower than the "considerably broader" "exemption enjoyed by diplomatic officials." *Senate Report* 3; accord 22 U.S.C. § 288c. Finally, Section 288d(b) grants organizational officials immunity for acts "in their official capacity and falling within their functions"—but not the across-the-board immunity that diplomats have. *Senate Report* 3.

To achieve its purposes, Congress could not simply have conferred the "same immunity" that foreign states enjoyed under the common law. Indeed, the provisions described above are designed to be read together with Section 288e(c), which provides that "[n]o person shall . . . be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein." 22 U.S.C. § 288e(c). Section 288a(b) did not raise the same concern: Congress intended to confer virtually absolute immunity for the reasons discussed above, and adopting the common-law rule applicable to foreign states accomplished that purpose.

b. Petitioners are also wrong to analogize Section 288a(b) to Section 288d(a), which provides that international organizations' officials "shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled to the same" privileges and immunities "as are accorded under similar circumstances to" certain foreign-state officials. 22 U.S.C. 288d(a); see also 22 U.S.C. § 288a(d) (using a similar formulation with respect to customs duties).

To be sure, Section 288d(a), in referring to "the same privileges, exemptions, and immunities" as for-

eign states, uses language like that contained in Section 288a(b). But the two provisions address different types of privileges and employ different surrounding language. Section 288d(a) does not address immunities enjoyed by foreign states under the common law; instead, it addresses exemptions from *statutory* requirements and duties that are granted to foreign states by "laws regulating" specified subjects. 22 U.S.C. § 288d(a).

Accordingly, both Congress and the Executive have construed Section 288d(a) (and the similarly worded Section 288a(d)) as a direction to extend to international organizations any regulatory exemption accorded to foreign states and officials. See 28 C.F.R. § 5.303 (exempting organizational officials from foreign-agent registration requirements); IOIA, 59 Stat. 669, 672, § 7(c)-(d) (1945) (exempting organizational officials from statutory limitations on entry); 19 C.F.R. §§ 148.81, .87, .89 (duties and taxes on baggage and effects); 19 C.F.R. § 145.2 (official communications by mail). Thus, international organizations were exempted from all of the enumerated requirements after the IOIA's enactment, and they remain exempt today.

C. The Foreign Sovereign Immunities Act Confirms That International Organizational Immunity Is Not Subject To Later Alterations In Foreign-State Immunity.

In 1976, Congress enacted the FSIA to "codify the restrictive theory of sovereign immunity, and . . . to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." *Samantar*, 560 U.S. at 313 (quoting 28 U.S.C. § 1602); see 28 U.S.C. §§ 1604-1605, 1607. The

FSIA's text and structure confirm that it does not change the IOIA's substantive rule of virtually absolute immunity. In key respects, the FSIA cannot sensibly be applied to international organizations. Had Congress intended that the FSIA would automatically apply to international organizations by virtue of Section 288a(b), it surely would have written the statute differently to avoid these anomalies.

1. a. The FSIA made sweeping changes to the scope of foreign-state immunity even beyond those made by courts as a result of the Tate Letter. In particular, the FSIA abrogated the absolute immunity from attachment and execution previously accorded to foreign-state property. See 28 U.S.C. § 1610(a). Thus, even if Congress thought that the Tate Letter had narrowed the immunity of international organizations, the FSIA would have restricted organizational immunity still further—and in a particularly devastating manner. Without immunity from execution, organizational funds—which represent the financial contributions of the United States and other member states—would be vulnerable to attachment and execution by the courts of the member states.

Abrogating immunity from attachment and execution therefore would have threatened the ability of international organizations to use their funds for their intended purposes. Such a severe impingement on their functions could also have caused friction with other member states whose contributions would now be at risk of attachment. One would expect Congress to have given some textual indication that it intended such a sea change. But the opposite is true.

By its terms, the FSIA applies only to "foreign states," a term that includes states themselves and their agencies and instrumentalities (e.g., governmental organs and political subdivisions). 28 U.S.C. § 1603. That term does not include international organizations, which are not sovereigns. As this Court has previously held, the definition of "foreign state" limits the FSIA's application; thus, because "foreign state" does not include foreign-state officials, the FSIA does not implicitly alter their pre-existing immunity. See *Samantar*, 560 U.S. at 320-325. So too with international organizations; Congress did not silently narrow their immunity.

b. Indeed, the FSIA's sole textual reference to international organizations demonstrates that Congress did not alter their immunity. Section 1610 makes foreign-state property subject to attachment and execution in enumerated circumstances. Section 1611(a) states that "notwithstanding" Section 1610, "the property of . . . [international] organizations shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States." 28 U.S.C. § 1611(a). This provision reflects Congress's recognition that because property owned by foreign states may often be held by international organizations, judgment creditors of foreign states might seek to satisfy judgments by instituting garnishment proceedings against international organizations. Section 1611(a) therefore prohibits execution against foreign-state property held by organizations, even though Section 1610 would otherwise allow execution against that property.

The House Report confirms that neither the FSIA generally nor Section 1611(a) specifically altered the immunity conferred by the IOIA: "The reference to 'international organizations' in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement." H.R. Rep. No. 94-1487, at 31 (1976). As the United States has opined: "Congress did not want the FSIA to conflict with the immunity accorded to such organizations under pre-existing law, which might occur were their property rendered attachable under the FSIA upon being designated for payment to a foreign state." U.S. Amicus Br. 18, *EM Ltd. v. Argentina*, 473 F.3d 463 (2d Cir. Apr. 5, 2006) (No. 06-0403-cv) (U.S. *EM* Br.).

2. Other provisions of the FSIA underscore how poor a fit the FSIA is for international organizations. For one thing, it is unclear *which* of the FSIA's rules would apply. The FSIA defines "foreign states" to include both the state itself, and its agencies and instrumentalities, 28 U.S.C. § 1603, and sets forth different immunity rules for the two types of entities. 28 U.S.C. § 1610; see also 28 U.S.C. §§ 1605(a), 1606. Given that the statute does not include international organizations in those definitions, it provides no guidance as to whether international organizations should be treated as foreign states, or agencies or instrumentalities. Had Congress thought the FSIA would govern international organization immunity, it would certainly have specified which set of rules would apply. See *Samantar*, 560 U.S. at 319 (declining to extend FSIA to officials in light of FSIA's failure to explain whether rules for foreign states or instrumentalities would apply).

In addition, subjecting international organizations to suit under the FSIA would be difficult to reconcile with the IOIA's provision that organizational archives are "inviolable" and therefore immune from all discovery. 22 U.S.C. § 288a(c). Foreign states themselves (as opposed to their diplomatic missions) were not generally immune from discovery once a court had jurisdiction over the suit. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998). The FSIA was drafted against that backdrop and does not displace civil rules governing discovery. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). So petitioners' reading leads to the anomalous result that a civil action can proceed against an international organization but plaintiffs cannot obtain any discovery from the organization—even though such discovery would be available had the suit been brought against a foreign state. That anomaly disappears if Section 288a(b) establishes a fixed rule of virtually absolute immunity. See *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (Scalia, J.).

II. EXECUTIVE BRANCH PRACTICE DEMONSTRATES THAT SECTION 288a ESTABLISHED A FIXED RULE OF VIRTUALLY ABSOLUTE IMMUNITY.

Executive Branch treatment of international organizations in the years following the IOIA's enactment cannot be reconciled with interpretation of Section 288a(b) that petitioners and the government advance. They now assert that international organizational immunity shrank drastically in 1952 by virtue of the Tate Letter, and again when the FSIA abrogated foreign states' immunity from execution. If that is correct, the

United States would have been in violation of its treaty obligations—or at least out of step with the international consensus on the necessary scope of immunity—with respect to several organizations that depended on the IOIA for their immunity. Yet there is absolutely no indication that the United States or the affected organizations viewed matters that way. To the contrary, the Executive repeatedly took actions that are consistent only with the assumption that the IOIA continued to provide virtually absolute immunity even after 1952.

1. The Executive Branch has repeatedly taken actions inconsistent the position it now espouses.

a. The Executive's treatment of the United Nations makes clear that the Executive interpreted the IOIA as providing virtually absolute immunity even after 1952. Article 105 of the U.N. Charter, which was not self-executing, committed the United States to provide the U.N. with immunities "necessary for the fulfillment of its purposes." U.N. Charter art. 105, ¶ 1. In 1946, the U.N. member states negotiated the United Nations Convention on Privileges and Immunities (Convention) to implement Article 105. 1 *Foreign Relations of the United States, 1947, General: The United Nations*, The Secretary of State to the Speaker of the House of Representatives 32 (Washington: Government Printing Office, 1973) (*1947 Foreign Relations*). The Convention provides that the U.N. should enjoy absolute immunity from suit, thereby confirming that absolute immunity was a "necessary" immunity under Article 105 of the U.N. Charter. See United Nations Convention on Privileges and Immunities, art. II, § 2; *id.* art. IV, §§ 11-16.

Until the United States ratified the Convention in 1970, the IOIA was the U.N.'s only source of immunity

under U.S. law (together with a headquarters agreement providing for immunity of the U.N.'s premises). See *1947 Foreign Relations*, Doc. 19 at 32, 35; Exec. Order No. 9698 (Feb. 19, 1946). Under petitioners' view, however, the scope of the U.N.'s immunity under the IOIA would have contracted to restrictive immunity in 1952. At the very least, that would have been in significant tension with the United States' commitment in the U.N. Charter to provide the U.N. with the "necessary" immunities.

Moreover, during this entire period, the Executive gave no indication that it believed the United States was according the U.N. anything less than virtually absolute immunity under the IOIA. To the contrary, in urging Congress to authorize accession to the Convention both before and after 1952, the State Department characterized the Convention as broader than the IOIA only in "minor" respects pertaining to the immunity of *officials*, not the U.N. itself. 33 *Foreign Relations of the United States, 1964-1968, Organization and Management of Foreign Policy*, The Representative to the United Nations to President Johnson, Doc. 423 at 915 (Washington: Government Printing Office, 2004); *1947 Foreign Relations*, Doc. 19 at 32; Richard Nixon, Message to the Senate Transmitting Convention on the Privileges and Immunities of the United Nations, 1969 Pub. Papers 1037 (1969). The Executive never once suggested that acceding to the Convention would bring about a substantial change in the organizational immunity afforded the U.N. under the IOIA. Had the Executive Branch believed that the Tate Letter substantially narrowed the U.N.'s immunity in 1952, accession would have been a far more urgent matter, as it would have involved far more than a "minor exten-

sion" of diplomatic immunity. Accession would have been necessary to restore to the U.N. the organizational immunity promised in its charter.

b. Similarly, under petitioners' construction of the IOIA, the Tate Letter would have sharply reduced the immunity of several international organizations within the U.N. system, to which the United States had committed to provide the immunity "necessary" for their functions. See, e.g., Constitution of the United Nations Educational, Scientific and Cultural Organisation art. XII, Nov. 16, 1945, 4 U.N.T.S. 275; International Labour Organization, Constitution art. 40 (1919); Food and Agriculture Organization, Constitution art. XVI (1945). Because these agreements were non-self-executing, *ibid.*; see *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014), these organizations' domestic immunity arose solely from the IOIA. Exec. Order 9863 (May 31, 1947); Exec. Order 9698 (Feb. 19, 1946). In 1947, the member states of these organizations concluded in the U.N. Convention on the Privileges and Immunities of the Specialized Agencies that these organizations should receive absolute immunity. The United States did not join that convention, instead leaving the IOIA as the only domestic source of immunity. It is difficult to imagine that, just seven years after these organizations were accorded virtually absolute immunity in the IOIA, the withdrawal of that immunity would have gone unremarked on by both the Executive Branch and the organizations themselves.

c. This trend continued after the FSIA's enactment. In 1977, the United States designated the International Centre for Settlement of Investment Disputes (ICSID) as an international organization under the IOIA. The treaty establishing the ICSID provided for abso-

lute immunity. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 20, Oct. 14, 1966, 17 U.S.T. 1270. The ICSID convention is not self-executing, *Medellin v. Texas*, 552 U.S. 491, 521 (2008), and its immunity provisions have not been legislatively implemented. But the Executive Order designating ICSID under the IOIA states only that ICSID "is hereby designated as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]." Exec. Order No. 11,966 (Jan. 24, 1977). If, as petitioners claim, the IOIA conferred only restrictive immunity in 1977, the United States would have immediately been in violation of its treaty obligations.

2. a. These examples disprove the government's assertion (Br. 26-27) that it has understood the IOIA to confer only restrictive immunity after the Tate Letter in 1952. The government now contends that whenever an organization has required absolute immunity, the United States has entered into a self-executing treaty or enacted implementing legislation providing for such immunity. But, as shown, that is simply not so. That the United States has *sometimes* entered into self-executing treaties providing for absolute immunity does not suggest any view of the IOIA. Such treaties reflect agreement among all member states of the organization, and they govern the organizations' rights in the territories of all member states. Consequently, such treaties cannot support an inference that the United States—let alone other member states—drafted

them with a particular interpretation of the IOIA in mind.[16]

Much more salient is the fact that numerous organizations have relied on the IOIA to provide them with the immunity that the United States committed to afford them in a non-self-executing treaty. As a result, the necessary consequence of the government's own interpretation of the IOIA is that the United States has been in violation of multiple commitments made through non-self-executing treaties.

b. The Executive actions described above cannot be squared with the government's current position that the IOIA incorporates the changing law of foreign-state immunity. In like manner, the government's position as expressed in litigation has swung from pillar to post. In 1980, the government asserted in the D.C. Circuit that international organizations had only restrictive immunity under the FSIA. See *Broadbent v. Organization of American States*, 628 F.2d 27, 31 (1980); U.S. Br. 28.[17] After the D.C. Circuit rejected that view in

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[16] The government is also wrong (Br. 26) that organization-specific statutes granting absolute immunity would be superfluous if the IOIA already did so. Such statutes typically address a range of immunities, some of which are beyond the IOIA's scope, and some of which incorporate an organization's waivers of immunity into domestic law. E.g., 22 U.S.C. § 290g-7. In addition, such statutes obviate questions concerning whether the relevant treaty is self-executing.

[17] The government argues that it contemporaneously characterized a 1992 headquarters agreement providing the Organization of American States (OAS) with absolute immunity as going "beyond the usual United States practice of affording restrictive immunity." Br. 27-28 (citing S. Treaty Doc. No. 40, 102d Cong., 2d Sess. VI (1992)). But that mention of "restrictive immunity"

Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335 (1998), however, the Executive Branch did not use its authority under Section 288 of the IOIA to clarify through executive order that any international organization enjoyed only restrictive immunity. Nor did the government urge the D.C. Circuit to reconsider its view.

To the contrary, in its most recent expression of a position on Section 288a(b), the United States informed the Second Circuit in 2007 that it "provides for absolute immunity of covered organizations." U.S. *EM* Br. 17 & n.*. The United States has now repudiated that position (Br. 29 n.8). But the fact that it has done so—along with the history of Executive practice described above—provides ample reason to afford the government's current views no deference. See *Carcieri v. Salazar*, 555 U.S. 379, 390 (2009).

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in the treaty context more likely referred to other treaties that deny organizations immunity for certain commercial activities. Indeed, the OAS agreement itself undermines the government's current position, as it states that in commercial cases submitted to arbitration, the arbitrator may not "issue an order that a court . . . would be precluded by the IOIA from issuing with respect to the property" of OAS. S. Treaty Doc. No. 40, at 6. That provision assumes that the IOIA precludes execution against organizational property even in commercial cases. But if Section 288a(b) required that the immunity of organizational property follow that of foreign states, execution would be permitted under the FSIA. 28 U.S.C. § 1610.

III. SUBJECTING INTERNATIONAL ORGANIZATIONS TO RESTRICTIVE IMMUNITY WOULD THREATEN THEIR ABILITY TO CARRY OUT THEIR MISSIONS.

A. Applying The Restrictive Theory Of Sovereign Immunity To International Organizations Would Defeat The Purposes For Which These Organizations Receive Immunity.

IFC and many other international organizations headquartered or operating in the United States have long relied on the certainty and predictability conferred by the IOIA's rule of virtually absolute immunity. See *Atkinson*, 156 F.3d at 1340. Construing the IOIA now to subject international organizations to the restrictive theory of sovereign immunity would disrupt that settled understanding and defeat the purposes for which these organizations were granted immunity.

1. At its core, the restrictive theory rests on a distinction between a foreign state's "sovereign" acts and its "private" or "commercial" ones. See pp. 23-24, *supra*. But that distinction has no purchase in the context of international organizations. *International Institutional Law* § 1610. These organizations are not sovereigns. Nor are they commercial actors. To be sure, IFC and other multilateral development banks routinely make use of the tools of commerce, such as providing financing and issuing securities. But they do so to advance their decidedly non-commercial missions of promoting international development, peace and stability.

Any suit that challenges the way an international organization pursues its objectives will necessarily implicate the underlying purposes of its immunity. That is because any such suit threatens to empower national courts (in particular, those of the host nation) to second-guess the organization's core policy judgments, and to burden its funds, including those contributed by member states. Applying the FSIA's foreign-sovereign-immunity exceptions to international organizations would therefore create a risk that U.S. courts will apply domestic-law principles to declare unlawful actions that the member states have collectively decided are necessary to carry out these organizations' missions—in direct contravention of the animating purpose of organizational immunity. See Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53, 63 (1995) ("[T]he imperii/gestionis distinction is inadequate to deal with these cases.").

For that reason, there is a strong international consensus that subjecting international organizations like IFC to suit for so-called commercial activities would be inconsistent with the purposes of their immunity. See, e.g., *International Institutional Law* § 1610, at 1033 ("[T]he application of the distinction between acta iure gestionis and acta iure imperii to acts of international organizations has been explicitly rejected by courts of other countries, and is also generally rejected in doctrine.") (citing cases); *Firma Baumeister Ing. Richard L v. O.*, judgment of 14 December 2004, File No. 100b53/04y, at 394, 397 (Austrian Supreme Court) ("While, under national law and prevailing international law, foreign states enjoy immunity only in respect of sovereign acts, but not in their capacity of legal

entities in private law, the immunity of international organizations must, [as] a matter of principle, be regarded as absolute when they are acting within the limits of their functions"). [18]

2. That rule is not at all anomalous. See Pet. Br. 33. Petitioners make much of the point that an organization would be immune for a commercial activity when the organization's member states would not have immunity for the "same" activity. But the activities are not the same. A foreign state that engages in commercial activities is not pursuing sovereign activities warranting immunity. By contrast, multilateral development banks' activities are commercial only in the sense that they employ tools of commerce to achieve the broader cooperative objectives for which its member states created it. The whole point of granting them immunity is to protect their ability to pursue these objectives.

The United States attempts (Br. 32) to sidestep the threat its position poses to the established purposes of organizational immunity, arguing that if member states believed that an organization's mission required a particular level of immunity, those states could have specified as much in the organization's governing charter. That misses the point. In enacting the IOIA, Congress would not have tied international organizational

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[18] See also *Stichting Mothers of Srebrenica v. United Nations*, ¶ 4.2, Case No. 10/04437, 13 April 2012, Hoge Raad, ILDC 1760 (NL 2012); *Investment & Finance Company of 11 January 1984 Limited v. UNICEF*, No. U 2000 478 Ø, ILDC 64 (DK 1999) (comment A2); *Consortium X v. Switzerland*, Final appeal judgment, BGE 130 I 312, ILDC 344 (CH 2004), 2nd July 2004, Switzerland.

immunity to developments in foreign-state immunity in the first place because it understood that the two immunities are conferred for different reasons. And a suggestion of this kind by the government is cold comfort to the international organizations whose charters were negotiated against the backdrop of the virtually absolute immunity that they assumed the IOIA provided.

B. Subjecting IFC And Other International Organizations To Suit Under The FSIA Will Impede Their Ability To Perform Their Missions.

IFC and other multilateral development banks finance projects in the most challenging parts of the world—projects that consequently are particularly likely to give rise to litigation. The United States has historically viewed the work of these organizations as critical to U.S. national-security interests precisely because they operate in "fragile and conflict-affected states" in order to provide "assistance that addresses the root causes of instability" and "respond[s] to global crises." U.S. Dep't of the Treasury, *Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies* 9-10 (2017). Subjecting these organizations to suits like petitioners' based on international development lending activities risks hobbling their ability to carry out their core functions.

IFC provides a particularly stark example of the threat. IFC has recently financed projects in Yemen, Chad, Afghanistan, and Iraq, to name just a few of the several hundred projects in which IFC is currently in-

volved.[19] As these investments illustrate, IFC has long viewed a key part of its mission to be fostering peace and stability by alleviating poverty and improving the lives of individuals in challenging environments, even when the lack of local stability increases the associated risks. Those aspects of IFC's mission directly further U.S. national-security and foreign-relations interests. At the same time, IFC's willingness to intervene in such challenging environments increases the risks of suits like petitioners'.

Indeed, petitioners' claims, and those like them, would pose a particularly acute threat to IFC's ability to function effectively. Perversely, petitioners base their claims for damages on IFC's efforts to use its financing activities to promote sustainable development in countries whose laws impose no comparably rigorous requirements. IFC seeks to encourage sustainable development by requiring funding recipients to adhere to IFC's own voluntary sustainability standards. These sustainability goals are also important to the United States. The Treasury Department, in the exercise of its leadership role within each development bank, "promotes universal access to affordable, reliable, sustainable and clean energy," and fosters public sustainability standards. U.S. Dep't of the Treasury, *Guidance for U.S. Positions on Multilateral Development Banks Engaging on Energy Projects and Policies*; U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks*.[20] Yet under petitioner's ap-

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[19] https://disclosures.ifc.org/#/projectMapping.

[20] https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx.

proach, it is IFC's very effort to go beyond local law to promote these objectives that subjects IFC to potential liability.

If petitioners prevail, IFC and other multilateral development banks will not merely be subject to suits like this one alleging that the organization's contractual rights render it liable in tort when financed projects fall short of meeting sustainability objectives. It is easy to imagine the myriad lawsuits to which international organizations could be subjected: suits challenging an alleged failure to enforce self-imposed labor or environmental standards; suits challenging the decision to invest in a particular country in the first place; and even suits seeking to hold an organization responsible for a host government's illegal conduct. Cf. *Kiobel*, 569 U.S. at 113.

Moreover, foreign nationals will be likely to target international organizations as defendants. Here, for instance, petitioners could not have sued the Indian corporations that allegedly caused their injuries: the lack of any nexus to the United States would have rendered the ATS unavailable and raised significant jurisdictional and procedural barriers. See *Jesner*, 138 S. Ct. at 1398, 1405. So petitioners are attempting to achieve the same result by a different route: suing IFC because it partially financed the project and is the only lender headquartered in the United States. Indeed, international organizations will offer prospective plaintiffs an attractive slate of characteristics: self-imposed, high environmental and social standards, deep pockets, and a jurisdictional hook to get their claims before a United States court—notwithstanding the United States' tenuous connection to the underlying events. If petitioners prevail, suits attempting to hold interna-

tional organizations liable for a wide range of alleged foreign injuries will proliferate. By adjudicating conduct within the jurisdiction of a foreign sovereign, such suits will raise the same policy and foreign relations concerns as the similarly foreign-focused, sweeping ATS lawsuits that proliferated after the Second Circuit permitted them in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See *Jesner*, 138 S. Ct. at 1406.

Even one such suit could enmesh an international organization in difficult litigation, alter its judgments about the projects it can reasonably fund and, if successful, drain billions of dollars earmarked for development projects. And such chilling effects, bad as they are, would not be the only problem. United States courts would sit in judgment over the collective policy decisions made by the member states of international organizations headquartered here. In this very case, a factfinder would second-guess IFC's institutional policy decisions, including the balance its member states have struck between sustainability and development, and its conclusions about the policies best suited to the organization and its projects. That is precisely the inappropriate interference that the Executive Branch, working together with other member states, sought to forestall when the Executive first recognized that international organizations must have immunity to protect them from suit in national courts. See pp. 21-22, *supra*.

Faced with those financial and policy consequences, multilateral development banks would have no choice but to reevaluate their operations and policies. IFC, for instance, would be forced to consider altering or even abandoning its sustainability standards, and to turn down viable projects to avoid the risk of litigation.

These changes would undermine a range of the United States' priorities with respect to development institutions, including fostering sustainability and accountability. And second-guessing by U.S. courts threatens to create severe tensions among member states, undermining IFC's ability to function as a collective institution.

Ultimately, "the prospect of costly litigation [based on investment in foreign countries] may hinder global investment in developing economies, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries." U.S. Amicus Br. 20, *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2007) (citation and internal quotation marks omitted). That concern is particularly acute in the context of the very international organizations that the United States established after World War II to promote peace, stability and development throughout the world.

C. Other Legal Doctrines Cannot Be Counted On To Eliminate These Risks To The Missions Of International Organizations.

Whereas petitioners believe that the very point of the IOIA and the FSIA is to subject the operation of international organizations to oversight by U.S. courts, the government suggests that such consequences are unlikely to materialize in practice. But the government misapprehends the risks.

Under the FSIA, foreign states are subject to suits "based upon a commercial activity carried on in the United States," or upon commercial activities performed elsewhere that have a defined nexus to the United States. 28 U.S.C. § 1605(a)(2). The FSIA fur-

ther provides that the "commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603. An activity is commercial if it is the sort of transaction that private parties can undertake, rather than something only sovereigns can do. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-615 (1992).

IFC and other development banks will vigorously argue that particular activities are not commercial within the meaning of the FSIA. But the FSIA's sovereign/commercial dichotomy does not map onto international organizations. They are not sovereign bodies, they are separate juridical persons, and they cannot take sovereign acts. And the fact remains that these organizations employ traditional financial tools in service of their overarching non-commercial objectives. If courts focus on the financial tools employed, they may conclude that those activities are commercial—a conclusion that would eviscerate immunity for IFC's core functions.

Notably, the government avoids stating that multilateral development banks' core activities will not be considered "commercial" for purposes of the FSIA. Instead it points to several second-order FSIA defenses. In particular, the government notes (Br. 33) that Section 1605(a)(2) requires that the commercial activity occur "in the United States." But many organizations are headquartered in the United States, execute transactions here, and denominate those transactions in U.S. dollars. While international organizations will certainly contend that suits like the present one cannot proceed under Section 1605(a)(2), the government can provide no assurance that courts will agree.

The government also points to the requirement that a suit be "based upon" the relevant commercial activity. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015). This requirement bars suits whose gravamen is disconnected from the underlying commercial activity. But as discussed, see p. 10, *supra*, IFC's financing agreements include standards designed to achieve salutary policy objectives that it views as important to the projects. It is those very standards that petitioners seek to turn against IFC by alleging that their suit is "based upon" a commercial activity in the United States. They will no doubt argue that their claims are based upon commercial activity because IFC included the standards in its lending agreements and allegedly failed to enforce them.[21]

It is true that some multilateral development banks' governing treaties, including IFC's, narrowly carve out certain suits by direct commercial counterparties from their immunity, because doing so is necessary to their ability to raise private capital. See pp. 9-10, *supra*. That reflects the member states' considered judgment that permitting such suits (but not others) furthers the individual institution's functions by facilitating certain transactional activities. But those exceptions are far narrower than potential applications of the FSIA's commercial activities exception. Because that exception merely requires that the claims be "based upon" commercial activities, court could construe it to permit

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[21] The government's suggestion (Br. 33) that IFC can simply rewrite its lending agreements to exclude purported third-party beneficiary claims overlooks that this is primarily a *tort* suit.

a wide range of tort claims arising out of development activities.[22]

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The best reading of the IOIA's text, considered in light of the statutory structure and the purposes for which it was enacted, mandates that international organizations continue to receive the same virtually absolute immunity that Congress prescribed when it enacted the statute in 1945. Abandoning that longstanding interpretation in favor of the restrictive immunity petitioners seek would defeat the fundamental purpose of organizational immunity by impeding international organizations' ability to pursue their development objectives. It would also open U.S. courts to a flood of foreign-focused lawsuits that would require U.S. courts to second-guess international organizations' core policy judgments, and that have only the most tenuous connection to the United States.

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[22] The FSIA's application is "[s]ubject to existing international agreements to which the United States is a party at the time of [its] enactment." 28 U.S.C. § 1604. IFC argued below that its Articles provide it with immunity from this suit even if the IOIA does not. C.A. Br. 16, 34-35. Because the question presented concerns only IFC's immunity under the IOIA, the scope of immunity under the Articles is not before this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 10, 2018